

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 472 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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M.R. GANDHI

Versus

DOHAD MUNICIPALITY,  
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Appearance:

MR RN SHAH for Petitioner

MR SK JHAVERI for Respondent No. 1  
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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 04/07/96

ORAL JUDGEMENT

Heard the learned counsel for the parties. The petitioner during pendency of this special civil application has retired from the services of the respondent. He filed this special civil application before this court with a prayer that act of the respondent of not giving him benefit of deemed date of promotion to the higher post since 1980 is illegal. This

is the only grievance made by the learned counsel for the petitioner in this special civil application. The petitioner was given the promotion on 3/4/1981 with effect from 10/4/1981 on the post of Senior Clerk which is admittedly equivalent in the status to the Store Keeper. On 19/6/1980, the respondent has ignored the case of the petitioner and other person, who is admittedly junior to him in the cadre of Junior Clerk was considered for promotion to the post of Store Keeper. The petitioner was not given promotion, and junior person was given the promotion.

Counsel for the respondent Shri S.K.Zaveri making reference to the provisions of Rule 80 and referring to Para 2 of the reply, contended that it was not the case of promotion but it was the case of giving special promotion by the respondent to the junior person. Be that as it may. It is a fact that the petitioner against the decision of the respondent dt. 19th June 1980 giving of the promotion or special promotion to the junior preferred an appeal to the Board and made the grievance, that he should have been given promotion being a senior. The appeal of the petitioner was allowed under the resolution dt. 29th October, 1980. It is a grievance of the petitioner that the appeal was allowed but the Chief Officer has not given effect to the same. As stated earlier, under the resolution dt. 3/4/1981, the petitioner was given the promotion with effect from 10th April, 1981 but he was not satisfied. The petitioner thereafter filed another appeal to the Board that he should be given promotion from 19th June, 1980. This appeal has also been allowed by the Board on 30th April, 1982, even that resolution was not given effect to, hence this writ petition before this court.

Learned counsel for the petitioner contended that when on both the occasions i.e. as per the order dt. 29-10-1980 and again as per the order dt. 3-4-1982 the appeal of the petitioner has been allowed and his grievance that he should be given the promotion with effect from 19th June 1980, has been accepted, then there was no reason with the respondent not to give him the benefits of deemed date promotion on the post of Senior Clerk with effect from 19th June, 1980. This action of the respondent is arbitrary on the face of it.

Shri S.K.Zaveri, learned counsel for the respondent has firstly contended that under the resolution dt. 19th June 1980, junior person to the petitioner was given special promotion for which the respondent has the power. He has contended that no case

is made out by the petitioner that his case was not considered. So far as the decision dt. 29th October, 1980 of the appellate authority - the Board is concerned, Shri Zaveri contended that the petitioner was considered to be given promotion of Senior Clerk and not to the post of Store Keeper and it was an understanding given to the petitioner that he will accept the promotion of the post of Senior Clerk. Shri Zaveri contended that the promotion can only be given from the date when the post was available and the post of the Senior Clerk was available only on 10th April, 1981 and the petitioner had given the undertaking to accept the promotion from the said date. He contended that the claim of the petitioner for deemed promotion is not tenable. It is next contended that otherwise also the resolution dt. 10th October, 1980 could not be of any help to the petitioner because the junior person who has been given the promotion under the resolution of dt. 19th June, 1980, was not heard before passing of the same. So far as second appeal before the appellate authority is concerned, firstly the learned counsel for the respondent Mr. Zaveri contended that the petitioner has not produced correct copy. The copy of the decision which the petitioner has produced on Page 21 of this special civil application is not correct. The appeal was not allowed but the appeal filed by the petitioner was rejected. When the counsel for the petitioner confronted Shri Zaveri with the reply, where the respondent admitted that the second appeal was allowed and he has given up this contention. Then he has contended that the post was not there earlier to 10th April 1981 and promotion which was given to the junior person from 19th June 1980 has not been set aside, the claim of the petitioner for deemed promotion could not have been accepted.

I have considered the respective contentions made by the learned counsel for the parties. To appreciate the order which has been passed in appeal by the appellate authority- the Board, dt. 29th October, 1980, with the consent of the parties, the memo of appeal has been taken on the record of this special civil application. The order of the appellate authority- the Board is not a speaking order but the appeal filed by the petitioner was allowed. In view of this fact, the order of the appellate authority- the Board has to be read in context with the prayer made by the petitioner in that appeal. Shri S.K.Zaveri, learned counsel for the respondent has read the memo of appeal in extenso. From the contents of the memo of appeal and the prayer, it is clear that the petitioner has made the grievance against his supersession in the matter of promotion made on 19th

June 1980 on the post of Store Keeper. He claimed promotion on that post from the said date. The order of the appellate authority- the Board wherein the appeal has been allowed, has to be construed in a manner that the relief prayed for by the petitioner has been granted. Shri S.K.Zaveri learned counsel for the respondent, though had tried to raise objections that the decision of the appellate authority was not justified as the junior who has been promoted, was not joined as party to this special civil application, but such a plea is not permissible while defending this special civil application filed by the petitioner as the respondent has no right to challenge its own order. The order which has been passed by the appellate authority has to be accepted. More so when at no point of time that order has been recalled or reviewed or cancelled. The another contention raised by the counsel for the respondent Shri Zaveri that the petitioner has given the undertaking that he will accept the promotion from future effect on the post of Senior Clerk is also not tenable. From the order of the appellate authority, nothing turns out, nor the respondent has produced on record any material to show that the petitioner has given such undertaking; nothing can be read as contended by Shri Zaveri in the order of the appellate authority. Shri Zaveri then contended that the order of the appellate authority has to be read in context with the reply of this special civil application filed by the Chairman, wherein he has stated in Para 4 that the petitioner has given out that he would never claim for the post of Store Keeper. This affidavit cannot be accepted because the President alone was not the party to the decision taken by the Board as appellate authority. The order has been passed by the Board as the Appellate Authority and not by President alone, something cannot be permitted to be provided or added by way of pleadings sworn by one person who was also participating in that deliberation, when the appeal of the petitioner was considered. The petitioner is said to have given up his right of promotion which is a serious thing and if it would have relied, the appellate authority should have passed a speaking order or should have taken this thing in writing from him. Where a person relinquished his right of promotion, then it should have specified by declaration and it cannot be presumed or assumed or inferred from what the President said in the affidavit which has been filed in reply to this special civil application. It cannot be said to a first version after litigation taken by the petitioner before this court. Any version can be given and may be manufactured or concocted at any time, possibility of which cannot be over-ruled.

This affidavit of the President cannot be relied. The President was not the only authority to decide the appeal of the petitioner. The appeals of the petitioner have been decided by the Board in which the President was one of the members. The decision was given by the Board in appeal of the petitioner. But nowhere a reference has been made that the petitioner has relinquished his right of promotion to the post of Store Keeper. The President filed the affidavit when the petitioner has come up before this court for grant of the deemed date of promotion to the post of Store Keeper and the Senior Clerk. At this juncture, the President may file any affidavit and what he has stated in Para 4 of the affidavit cannot be taken to wholly true. Possibility of manufacturing or concoction of plea as has been taken in the affidavit cannot be over-ruled in the facts of this case. Apart from this, it is a matter of relinquishment of some right of promotion by the petitioner and unless it is specifically made in writing or it is specifically recorded in the decision of the appellate authority, no inference or presumption or assumption can be drawn thereof only on the basis of what the President has stated in reply to this special civil application.

The decision of the appellate authority given in the first appeal and then in the second appeal cannot be read in the manner as it is stated to be read by Shri S.K.Zaveri, learned counsel for the respondents. On both these occasions, it is not disputed that the appellate authority has accepted the appeals of the petitioner. As stated earlier, the order of the appellate authority has to be read in the context of the grievances of the petitioner made and the relief claimed in the appeal. A plain reading of the memo of appeal leaves no doubt in the mind of the court that the petitioner claimed promotion from the deemed date, when his junior is promoted. The pay scales of the posts of Store Keeper and Senior Clerk were the same and as such, it is immaterial whether he is given promotion to the post of Store Keeper or Senior Clerk. These facts also have no much substance as during pendency of this special civil application, the petitioner has already been retired from service. Shri S.K.Zaveri has contended that the petitioner was given promotion to the post of Senior Clerk though from prospective date and he is entitled to get benefit to that effect. The petitioner has not prayed for deemed promotion. It is a case where the Board which is a highest authority has taken this decision in favour of the petitioner but for the reasons best known to the authority as well as subordinate i.e.

President, that decision was not given effect and for this, the petitioner is constrained to approach this court for the relief which has in fact been granted to him by the Board.

Shri Zaveri contended that the petitioner was given promotion to the post of Senior Clerk on 10th April, 1980 and therefore, there is no question of giving deemed date promotion to the petitioner. I do not find any substance in this contention also. The petitioner was all the time vigilant about his right and when his junior was promoted on the post of Store Keeper, he filed an appeal which has been allowed. It is different matter for the reasons best known to the respondent that order of the appellant authority was not been given effect, otherwise junior persons could have been reverted and the petitioner could have been promoted. Merely because, the proper course has not been adopted, the petitioner cannot be denied of his promotion. In view of these facts in case, the petitioner is denied right of deemed promotion, then this court will give a premium to the inaction or omission of the respondent.

In the result, this special civil application succeeds and the same is allowed. The petitioner is hereby declared to be entitled for deemed date promotion on the post of Store Keeper with effect from 19th June, 1980 and he shall be entitled to all other consequential benefits.

It is further directed that necessary order for refixation of pay with effect from 19-6-1980 of the petitioner in the pay scale of Store Keeper be passed within a period of three months from the date of receipt of certificate copy of this order. The arrears payable to the petitioner of fixation of pay as aforesaid be paid within a period of two months thereafter. It is further directed that necessary orders regarding revision of pension and other retirementary benefits may be passed within three months of the receipt of copy of this order and arrears thereof be paid to the petitioner within a period of two months thereafter.

Learned counsel for the petitioner submitted that the petitioner has unnecessarily been harassed and was constrained to file this litigation. Litigation costed to the poor person who has pursued this litigation for all these years and he would have incurred sufficiently good amount. Be that as it may, interest of justice would be served in case the petitioner is awarded Rs.2,000/- by way of cost of this petition. The respondent is directed to pay Rs.2,000/by way of costs of

this petition to the petitioner. Rule is made absolute  
in aforesaid terms.

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